70-6

In the Supreme Court of the United States

October Term, 1970
No. ~~558~~

NELLIE SWARB et al.,
Appellants
v.
WILLIAM LENNOX et al.,
Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA-APPELLEE

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STATEMENT

On December 23, 1969, suit was commenced in this action by plaintiffs in the United States District Court for the Eastern District of Pennsylvania. Motions were made for temporary and preliminary injunctions and, accordingly, notice of the pending of this action and attendant motions was served on the prior Attorney General of the Commonwealth of Pennsylvania pursuant to 28 U.S.C. §2284. At the hearing on the preliminary injunction, Herbert Monheit, Esquire, Assistant Attorney General, appeared on behalf of the Commonwealth and the prior Attorney General and filed a brief against plaintiffs raising questions of jurisdiction. The prior Attorney General did not become substantially involved in this case again until October, 1970, when the Deputy Clerk, of the United States Supreme Court sent a letter to him requesting him to determine if he would continue participation. Earlier in August, 1970, the former Pennsylvania Attorney General had been served with a copy of the appellant's jurisdictional statement. In December, 1970, the prior Attorney General indicated to the Chief Deputy Clerk of this Court that the Commonwealth would not participate in this appeal.

Subsequently, the prior administration terminated office on January 20, 1971, and the present administration took office. Shortly thereafter, the new administration determined that it would be in the best interest of the citizens of the Commonwealth to par-

ticipate in this case on behalf of the appellants. In April, 1971, the present Attorney General filed and sent to this Court its notice of appearance, a memorandum in support of appellants' application for a stay, and certificate of service.

This case presents the question of whether the statutes and rules of Pennsylvania authorizing and establishing the procedure of confession of judgment are unconstitutional on their face in violation of the due process clause of the Fourteenth Amendment. The Court below held that these statutes and rules were unconstitutional when used against obligors who made less than $10,000 per year and had signed a contract containing a confession of judgment clause in connection with purchases of goods and services at retail. The Court below, however, ruled that these same statutes and rules were not unconstitutional when used against obligors who made more than $10,000 per year or who had signed an instrument accompanying a mortgage and containing a confession of judgment clause.

Confession of judgment has been a practice engaged in for over one hundred and sixty years in the Commonwealth of Pennsylvania. Beyond its longevity, the practice has little to commend it. As ably described in appellants' brief and the brief *amicus* of The National Consumer Law Center, an obligor who signs an instrument in Pennsylvania containing a confession of judgment clause may have a judgment entered against him without notice or opportunity to be heard on any of the growing number of defenses he may assert against the obligee under this same procedure. The only remedy afforded to the obligor to ex-

tricate himself from the confessed judgment is the so-called petition to strike or open the judgment. This petition is addressed to the discretion of the Court sitting in equity, imposes the burden on the obligor to establish the right to have the judgment stricken or opened, is costly and manifestly inadequate. See *Swarb et al. v. Lennox et al.*, 314 F. Supp. 1081, at p. 1096 (E.D. Pa. 1970).

The confession of judgment procedure in Pennsylvania described above has a tantalizing simplicity, swiftness and certitude but it ignores fundamental due process rights of notice and opportunity to be heard for the consumer. It is the view of the Department of Justice of the Commonwealth that it is the duty of this government to assure that these fundamental rights are enforced and protected. To illustrate the problems created by confession of judgment this Court is respectfully referred to the testimony of Detective Thomas Veney, a law enforcement officer of the County of Philadelphia and the Commonwealth. He and his office have been the recipients of numerous consumer complaints and grievances which have become all the more tension ridden when the aggrieved consumer is told that he had "confessed judgment" and that there are no remedies available which afford him his day in Court. Additionally, the Court's attention is directed to the monumental work of the National Advisory Commission on Civil Disorders; a work to which law enforcement officers and Attorneys General throughout the country do or should pay heed. The report refers specifically to confession of judgment as being one of those practices which seem particularly iniquitous to the poor of our society and

makes a mockery of the Anglo-American legal tradition that every man is to have his day in Court. *Report of the National Advisory Commission on Civil Disorders*, U. S. Government Printing Office, 1968, at pp. 92, 113, 139-41.

Finally, as the officer of the Commonwealth charged with the direction and supervision of the Pennsylvania Bureau of Consumer Protection, this office has noted that the rights and protection of all, not just the poor, citizens of this Commonwealth are being expanded to protect their interests as home purchasers, consumers and lessees. The confession of judgment procedure described above denying obligors notice and opportunity to be heard or to assert any of their defenses makes unenforceable any of these newly created rights.

The present Attorney General, therefore, respectfully submits that the statutes and rules of Pennsylvania authorizing confession of judgment are unconstitutional on their face and the Court below erred in ruling that these statutes and rules are not unconstitutional in instances where the obligor signing the confession of judgment clause earns more than $10,000 per year or signs the clause in connection with a mortgage.

ARGUMENT

There Being No Method of Assuring That the Requisite Waiver of Constitutionally Protected Rights Has Occurred Under the Confession of Judgment, Statutes and Rules, the Statutes and Rules Are Unconstitutional on Their Face

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As noted above, the Court below held that the confession of judgment statutes and rules were not unconstitutional in those instances where the obligor makes $10,000 per year or signs an instrument containing a confession of judgment clause accompanying a mortgage. In so ruling, the Court held that the statutes and rules were not unconstitutional on their face. This ruling is clearly erroneous and ignores the major constitutional defects of confession of judgment whenever and to whomever applied.

It is well established that two fundamental prerequisites of due process under the Fourteenth Amendment (U. S. Constitution, Amendment XIV) are notice and opportunty to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1949); *Wuchter v. Pizzutti,* 276 U.S. 13 (1928); *Armstrong v. Manzo,* 380 U.S. 545 (1965); *Sniadach v. Family Finance Co.,* 395 U.S. 337 (1969); and *Bell v. Burson,* 39 U.S.L.W. 4607 (U.S. May 24, 1971). Most especially, these rights cannot be waived unless there are carefully devised safeguards surrounding the waiver to assure that the waiver was knowing and volun-

tary. An analysis of the statutes and rules here questioned discloses no such safeguards. Failure to provide such safeguards in any and all of the situations in which confession of judgment is authorized makes the statutes and rules unconstitutional on their face.

In the transaction typical of those in which the Court below permitted the continued use of confession of judgment, the obligor will sign a contract or instrument accompanying a mortgage containing a confession of judgment clause. A form of such a clause appears at p. 12 of appellants' brief, footnote 1. As will be discussed more fully in point II below, the contract or instrument in which the clause appears is a form contract of adhesion. The statutes and rules permit the obligee on the contract or instrument and require the prothonotary to enter the judgment immediately regardless of whether default has occurred. The judgment entered acts as a lien on the obligor's property. Rule 2958 (a) of the Pennsylvania Rules of Civil Procedure. At this stage of the proceeding the obligor has an outstanding judgment against him and, of course, has not received formal notice or been given an opportunity to contest the underlying claim. Ironically, at this time, the obligor may have first discovered that the obligee breached the terms of the contract, imposed excessive finance charges, breached a warranty or even committed fraud.

Moreover, the obligee under the statutes and rules can proceed to execute on the judgment, again in *ex parte* proceedings. By the mere filing with the prothonotary of an averment that default has occurred a writ of execution must be issued. Notice of entry of the judgment may be mailed to the obligor at this time

if the sheriff's sale is to be held, although the usual practice is to serve the notice of entry with the writ of execution. Again, the obligor is not given the opportunity to present his defenses to any court and his plight is all the more serious because he is faced with imminent sale of his property.

It stretches credulity to surmise that any person voluntarily waived his rights to notice and hearing fully comprehending the consequences of his act in signing a confession of judgment clause.

The obligor cannot waive defenses he cannot foresee and at the time of the execution of the contract he may not, and in more instances does not, foresee the myriad of legal claims he may have against the obligee arising out of the transaction. Moreover, there will be no way for any court to determine in those rare instances, if there are any, whether or not the obligor was fully apprised of the consequences of signing a confession of judgment clause and did so voluntarily.

This Court has stated on numerous occasions that waiver of the fundamental constitutional rights will not lightly be inferred. *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Brady v. United States,* 397 U.S. 742 (1970); *Miranda v. Arizona,* 384 U.S. 436 (1966).

The clear meaning of those cases is that there must be a mechanism within the legal process that assures a court that the waiver occurred knowingly and voluntarily. In *Wuchter v. Pizzutti,* supra, this Court was faced with the question of whether the New Jersey Non-Resident Motor Vehicle Statute accorded due process to non-residents sued in New Jersey Courts

when the statute made no provision that notice of the pending action be served on the non-resident defendant.

In view of the fact that no provision for notice was set forth in the statute, this Court held that the statute denied due process of law to the defendant notwithstanding the fact that defendant received actual notice of the pendency of the action against him.

In so holding this Court stated at 19:

> ". . . the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him; by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the Secretary of State or some officer of the state, without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (Heinemann v. Pier, 110 Wis. 185) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law."

In *Mullane v. Central Hanover Bank,* supra, this Court was faced with the question of the constitutionality of the New York Common Trust Fund Statute. Under the provisions of that Act the trustee of common trust funds was permitted to serve notice of an action for an accounting on all beneficiaries, both immediate and remote, by publication in a New York newspaper. With regard to the notice provisions of the statute permitting service by publication on all immediate beneficiaries whose names and addresses were in the possession of the trustee, this Court held those provisions unconstitutional. As in *Wuchter v. Pizzutti,* supra, there was no reasonable provision in the statute to assure that the right to notice had been protected.

Finally, in a case almost identical to the case at bar, the District Court in Delaware declared the confession of judgment statute of Delaware unconstitutional on its face. *Osmond v. Spence,* ___ F. Supp. ___, 39 L.W. 2660 (D. Del., 1971).

Judge Layton in discussing deficiencies of the Delaware procedure in assuring safeguards as to the question of requisite waiver stated at 2661,

> "We conclude then, that the Delaware statutory scheme here under attack is fatally defective in that, by failing to provide for notice and hearing preceding entry of judgment, there is no method of judicially determining whether or not a particular debtor knowingly and intelligently signed the judgment note thereby waiving his 14th amendment rights. So that, even conceding as we do, that there may be a substantial number

of persons . . . who do sign such notes with a full realization of the legal effect of their acts, it remains that the Delaware practice furnishes no judicial means for separating the case of those persons who have knowingly and intelligently waived from those who have not."

The Strong Presumption Against a Waiver of One's Constitutional Rights Was Not Overcome in the Court Below. Therefore the Statutes and Rules Are Unconstitutional on Their Face

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This Court has carefully scrutinized those situations in which there have been purported waivers of constitutional rights. In the landmark case, *Johnson v. Zerbst,* 304 U.S. 458 (1938), the Court states at 464:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'. A waiver is ordinarily an intentional relinquishment or abandonment of a known right of privilege."[1]

The confession of judgment procedure as it applies to all citizens of the Commonwealth of Pennsylvania,

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[1] That the principles established in *Johnson v. Zerbst* apply to civil cases as well as criminal matters is made clear in *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 307 (1937), where the Court declares: "We do not presume acquiescence in the loss of fundamental rights." See also *Aetna Insurance Company v. Kennedy,* 301 U.S. 389, 393 (1937).

induces consent to an ex parte proceeding where judgment is rendered without any determination of the merits of the claim, and thereby, constitutes a waiver of due process rights. The Court in *Brady v. United States,* 397 U.S. 742 (1970), stated at 748:

> "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts, done with sufficient awareness of the relevant circumstances and likely consequences."

See also *Brookhart v. Janis,* 384 U.S. 1 (1966).

Where persons are compelled to sign agreements containing the ubiquitous confession of judgment clause,[2] the affixation of one's signature to an agreement waiving due process rights can hardly be said to be voluntary. See *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A. 2d 69 (1960). The question of voluntariness has been considered by this Court frequently and in some detail. Recently, the Court has held that waivers of one's constitutional rights were without effect because such waivers were not voluntary. See *Bumper v. North Carolina,* 391 U.S. 543 (1968), and *Miranda v. Arizona,* 384 U.S. 436 (1966). In *Garrity v. New Jersey,* 385 U.S. 793,

[2] For information on the pervasive use of confession of judgment notes, see Hobson, *Cognovit Judgments. An ignored problem of due process on full faith and credit,* 29 U. Chi. L. Rev. 111 (1961); Schuchman, *Consumer Credit by Adhesion Contracts,* 35 Temp. L.Q. 125 (1962); Tanner, *Uniformity of Judgment Notes in Pennsylvania,* 44 Dick. L. Rev. 173 (1940); Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania,* 72 Dick. L. Rev. 115 (1968); Note, *Confessions of Judgment,* 102 Pa. L. Rev. 524 (1954).

798 (1967), this Court stated that there can be no waiver when the element of choice is, in reality, one "between the rock and the whirlpool". It is precisely this kind of choice that is the only one available to a consumer who enters into a credit transaction in Pennsylvania. Consequently, the borrower either adheres to the terms set forth or goes without the credit. The interest in maintaining an equal bargaining position between parties to a contract is violated and a contract of adhesion results.

A contract of adhesion is one in which a standard contract is drafted unilaterally by a dominant party and presented to the weaker party as the only acceptable instrument. Ehrenzweig, *Adhesion Contract in Conflict of Laws,* 53 Colum. L. Rev. 1072, 1074 (1953). These contracts are most prevalent in consumer credit transactions, where the borrower must have the credit and, therefore, is forced to accept the terms presented. Schuchman, *Consumer Credit by Adhesion Contract,* 35 Temple L.Q. 129 (1962). It is inaccurate, therefore, to term such transactions as contractual in the strict sense of the word. A contract is an "agreement between two . . . parties . . . in which minds of parties meet and concur in [the] understanding of terms." Black's Law Dictionary, revised 4th ed., p. 394. Adhesion contracts of this type, supra, do not provide for a meeting of the minds, in that the inferior party has no choice as to alternative contracts containing varying terms, but is forced to accept the agreement as it stands or forego the use of credit altogether. Thus, the defense raised that there is a consent to waive one's constitutional rights is a myth. Comment, *Abolition of the Confession of*

Judgment Note in Retail Installment Sales Contracts in Pennsylvania, 72 Dick. L. Rev. 115, 117-118 (1968). This applies to members of all economic classes. If there are no terms to be agreed upon, there is no meeting of the minds and, consequently, there can be no consent to any waiver of constitutional rights, but merely an involuntary acquiescence to a contract of adhesion.

The Court below has effectively circumvented the presumption against waiver of constitutional rights for a large segment of Pennsylvanians. In the lower Court's decision, the key concept discussed, in relation to waiver, was "understanding". *Swarb et al. v. Lennox et al.,* 314 F. Supp. at 1100-01. In focusing on the question of whether there was an understanding or knowing waiver, the District Court overlooked question of voluntariness, the other prerequisite of constitutional waiver, and disregarded major portions of the record. Alan Kasnoff, a witness for plaintiffs, in uncontradicted testimony said that confession of judgment clauses were used in almost every mortgage transaction he was acquainted with, and Detective Veney testified that 95% of the people he had interviewed had signed instruments containing confession of judgment clauses. Defendants stipulated that all of the contracts used by their clients contained such a clause. The defendants offered no evidence to contradict this proof.

On the basis of this record the Court below clearly should have found as fact that use of confession of judgment clauses was pervasive throughout Pennsylvania and incorporated in form contracts of adhesion.

The proof appears so overwhelming that this fact may also have been appropriately subject to judicial notice. See *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970), where the court took judicial notice of the fact that form leases were adhesion contracts.

At the very least, plaintiffs' proof, the operation of the presumption and the absence of any contradictory evidence clearly established plaintiffs' right to relief for all members of the class they claimed to represent, including those persons making more than $10,000 per year and signing instruments containing confession of judgment clauses accompanying mortgages.

The Court Below Improperly Applied the Federal Rules of Civil Procedure To Confine Its Ruling to a Limited Sub-Class of Individuals

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The Court below relied on Fed. R. Civ. P. 23 to limit relief to a distinct sub-class of individuals.[1] The decision failed to declare judgment notes unconstitutional for those persons with incomes in excess of $10,000 and for those who sign bonds and warrants of attorney accompanying mortgages. The Court justified the income limitation on the ground that there was no showing that appellants brought the class action as "representative parties who fairly and adequately protect the interest of persons signing con-

[1] The Court in 314 F. Supp. 1091, at 1098, n. 18 held "Fed. R. Civ. P. 23(c)(4) contemplates that relief may be granted to a sub-class of those instituting the action and as to particular issues."

fession of judgment notes who have incomes of over $10,000." 314 F. Supp. 1098-99. The Court further reasoned that appellants did not produce sufficient evidence indicating that persons who sign bonds and warrants of attorney accompanying mortgages did not consent to the confession of judgment procedure. 314 F. Supp. 1099.

Appellants brought this class action on behalf of all "individual natural" Pennsylvania residents "who have signed contracts authorizing . . . judgments to be entered against them," under the confession of judgment statutes and rules. 310 F. Supp. 1098. To be maintainable as a class action, a suit must meet the requirements enumerated in Section (a) of Fed. R. Civ. P. 23 and also must fall within one of the subsections of Rule 23(b). Rule 23(a), as amended in 1966, provides as follows:

> "One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties are typical of the claims . . . of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The Court below did not contest the first three requirements of Section (a) of the Rule; the size of the class, the common nature of questions of fact or law, and the claim of the parties being typical of claims of the class. The Court's one objection under Rule 23(a) is that the appellants do not fairly and

adequately represent the interest of those persons within the original class who have incomes in excess of $10,000 or who sign bonds or warrants of attorney accompanying mortgages.[2]

The Court's reasoning for holding that appellants did not fairly and adequately represent the above mentioned "sub-classes" is twofold: first, the Court expressly found an inadequate number of representatives for these sub-classes, 314 F. Supp. 1098; second, the Court impliedly determined there was a conflict of interest between those who earn over $10,000 and those who earn less than $10,000, 314 F. Supp. 1099.

In holding that since only four percent of the Caplovitz study earned in excess of $10,000 the appellants did not properly represent those persons with incomes above that sum, the Court ignored the well established interpretation of Rule 23. In *Epstein v. Weiss,* 50 F.R.D. 387 (E.D. La. 1970), the Court held, at 391:

> "It is now well settled that neither the number of representative parties nor their financial interests is controlling in determining whether the plaintiffs will fairly and adequately protect the interests of their class. Thus, a single plaintiff may represent the entire class . . . if other factors indicate that he will fairly and adequately protect the interests of his class."

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[2] It is well established that the Federal Rules of Civil Procedure are to be construed in a liberal manner to accord substantial justice over mere technical contentions: See *U.S. v. Nutrition Service, Inc.*, 234 F. Supp. 578 (W.D. Pa. 1964), affirmed 347 F. 2d 233; *Schaedler v. Reading Eagle Publication, Inc.*, 370 F. 2d 795. (Cir. Pa. 1967).

See also *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968). It is obvious, therefore, that the number of persons coming forward to protect the interests of a class is not determinative of adequacy of representation.

As noted above the Court below went on to hold that the abolition of judgment notes would increase the difficulty for persons earning over $10,000 to secure credit and, therefore, it would not extend these possible consequences to such a class of individuals, whom it deemed were not adequately represented by named plaintiffs, 314 F. Supp. 1099. This reasoning establishes an obscure conflict of interest between individuals of different income levels as a basis for the severe limitations placed on appellants class action suit. It is submitted that there cannot be any serious conflict of interests between any class or sub-class concerning the protection of due process rights, and whatever diverse interest that might possibly exist in the present case is conjecture and *de minimis*.[8] The predominant issue before the court was the violation of due process rights and the securement of credit cannot be such a substantial conflict of interest that it would defeat the appellants class action. The courts have held that for a conflict of interest to compromise

[8] The Advisory Committee on Rules in the notes on Fed. R. Civ. P. 23 would not agree to such a severe limitation of the class action brought by appellants. Where there is a common issue (violation of due process) a single class action may be brought and the class should not be divided into sub-classes unless there are diverse interests. See Notes of Advisory Committee on Rule 23(c)(4), 28 U.S.C.A. pocket part, p. 89.

a class action suit, it must be one involving the very issue in litigation. See *Berman v. Narragansett Assoc.*, 414 F. 2d 311 (1st Cir. 1969), cert. den. 396 U.S. 1037; *Mersey v. First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y. 1968). It is also reasonable to assume that if any party is to be handicapped by a removal of protections afforded to creditors, the individuals having low incomes will suffer considerably more than those in the higher income brackets.

Even if it were concluded that a reasonable distinction can be made between those having incomes above and below $10,000 annually, the Court erred in finding that sufficient evidence was not offered concerning those individuals having incomes in excess of $10,000 annually. Only one witness, Plaintiff Doris Mims, confined her testimony to the factual situation surrounding those earning under $10,000. Other witnesses, documents, and studies, while concentrating on the problems of the poor, made reference to the pervasiveness of the confession of judgment procedure.

In defining a separate sub-classification for individuals who sign mortgages accompanied by bonds and warrants, the Court sets forth three dictinctions between these and other transactions. The Court notes the closing of most transactions at title company settlements; the existence of certain local rules available only in Philadelphia; and special requirements which exist under Regulation "Z" (12 C.F.R. 226ff) of the Fair Credit Reporting Act (Truth in Lending), 15 U.S.C.A. 1681-1681t. The issue of closings at title company settlements is an irrelevant

one. The documents signed at such settlement were introduced into evidence and there is evidence that these procedures do not differ significantly from any other. There was no evidence that such settlements differ in any relevant manner from those conducted by intervening defendants. In addition, a steadily increasing proportion of mortgage settlements do not take place at title company closings.

The distinctions based on the Philadelphia Common Pleas Court Rule 3129 *(f)(1) and Federal Regulation "Z" represent a clear misinterpretation of the law by the Court below. The local Philadelphia rule in question does not provide for notice of execution, but only for notice of entry of judgment in which notice may come at any time between the entry of judgment and the issuance of execution. Most important, the reference to Truth in Lending Regulation "Z" totally misinterprets that section of the regulation. The Court implies that the three day right of rescission exists only in situations where purchasers have signed mortgages accompanied by bonds and warrants. In fact, a careful reading of the section discloses that a rescission period exists in all cases where confessions have been taken, with the exception of confessions taken to secure the purchase of an individual's residence. The purchase of a residence was clearly uppermost in the Court's mind when it created an exception for mortgages.

The Court Below Erred by Improperly Redrafting Statutes and Rules Covering the Entry of Judgment by Confession

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Mr. Justice Douglas speaking for this Court in *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337 (1969), stated that courts "do not sit as a super-legislative body." This, however, is exactly what the Court below did in holding that the statutes and rules covering confession of judgment in Pennsylvania were applicable in some cases, but not applicable in others. The court has, in effect, rewritten these statutes and rules so that they meet the court's test of constitutionality; a function reserved for the Legislature. The Supreme Court of Pennsylvania has recently refused to take such action in connection with a statute of its own State. In finding that the statute could not be upheld without adding conditions and corrections not contemplated by the Legislature, the Court stated in *State Board of Chiropractic Examiners v. Life Fellowship,* 441 Pa. 293 (1971), at 300:

> "Conceivably the statute could be further rewritten so as to avoid constitutional infirmities. However, such a task lies properly with the Legislature for additional editing of Section 15 on our part would amount to judicial legislation."

In an earlier case discussing the issue of severability of statutes, the Pennsylvania Supreme Court noted:

> "It is true that a statute or ordinance may be partially valid and partially invalid, and that if

the provisions are distinct and not so interwoven as to be inseparable, that the Courts should sustain the valid portions. . . . [citing cases]"

Saulsbury v. Bethlehem Steel Co., 413 Pa. 316, 320 (1964).

". . . In determining severability of statutes or ordinances the legislative intent is of primary significance. However, the problem is twofold: the legislating body must have intended that the act or ordinance be separable and the statute or ordinance may be capable of separation in fact. The valid portion of the enactment must be independent and complete within itself. [citations omitted]"

Saulsbury v. Bethlehem Steel Co., supra, at 321.

Similarly, this Court has refused to sever statutory language when to do so would be to rewrite legislation of Congress or a State. *Marchetti v. United States*, 390 U.S. 39 (1968); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

The statutes and rules affecting confession of judgment have been in effect in Pennsylvania since 1806. During that time numerous amendments and changes have been made, but none has ever been used to limit the class of persons against whom judgments could be entered by confession. No ruling of the State Supreme Court or act of the Legislature in these long 165 years has indicated an intention to limit the effect of the statute in any way. The Court below has attempted to imagine what the state legislature would have done if the statute were ruled unconstitu-

tional as applied to certain classes of individuals, in direct contravention of an earlier decision of this Court. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

We do not request that this Court interpret Pennsylvania statutes any more than we want our Pennsylvania Supreme Court to act as a super-legislative body. The distinctive roles exercised by the Judiciary and the Legislature are quite well defined; therefore, we request this Court to rule that the Federal District Court invaded the province of the Legislature in arriving at its conclusion below.

CONCLUSION

For all of the reasons stated above, the Commonwealth of Pennsylvania joins with the Appellants in respectfully praying that the judgment of the Court below be reversed to the extent that it limits its declaration of unconstitutionality to certain specified classes of individuals, and that this Court enter a judgment declaring the Pennsylvania statutes and rules establishing the procedure of confession of judgment unconstitutional on their face.

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